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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 992

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,

vs.

EUGENE LUDWIG, as Guardian of the Estate of
Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of
Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of
John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO.,
a Michigan Corporation, as Subrogee of
John Zatek, Cause No. 22025,
Respondents

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

At the outset, your Petitioner wants to call the Court's attention to the case of *Herbert Heider, Adm., et al., Petitioner v. Michigan Sugar Co., Respondent,* Docket No. 869, in which this Court recently granted certiorari in a case parallel to the instant case. In *Heider, supra,* Respondent had appealed to the Supreme Court of Michigan from judgments entered by the Trial Court in favor of Petitioner.

In that case, Respondents raised, for the first time on appeal, a defense to the actions based upon a statute of the State of Michigan which had not been pleaded or relied upon in the Trial Court and Petitioner had not, therefore, been apprised of this defense and, of course, had introduced no proofs as to the applicability of the statute. The Supreme Court of Michigan reversed judgments in favor of Petitioner and entered final judgment in favor of Respondent. From the judgment of the Supreme Court of Michigan, Petitioner filed with this Court its Petition for Writ of Certiorari, claiming that Petitioner's constitutional rights had been violated on the grounds that it had no opportunity to present evidence or offer pleadings in the Trial Court on the defense first raised in the Supreme Court, and that Respondent had changed its legal position at the appellate level. This Court granted certiorari.

The instant case is parallel to the *Heider* case *supra*. In *Heider* Petitioner was deprived, at the trial level, of his right to be apprised of the theory of defense which ultimately prevailed and Petitioner was therefore deprived of the opportunity, at the trial level, to present facts to contest the applicability of the statute and was also deprived of the opportunity to have the jury determine from the facts whether or not the statute was a defense to the action. In the instant case, Petitioner was deprived, at the trial level, of its right to be apprised of the facts relied upon to sustain the jury verdicts since these facts were judicially noticed by the Court of Appeals and therefore Petitioner had no opportunity to dispute the facts thus judicially noticed. Petitioner was also deprived of its right to have the facts judicially noticed presented to the jury for the jury's consideration in determining the ultimate rights of the litigants. In the instant case, the Petitioner was also deprived, at the trial level, of its right to be ap-

prised of the theories of recovery which were asserted by the Court of Appeals to sustain the jury verdicts since these theories were first advanced in the decision of the Court of Appeals. This action also deprived Petitioner of its right to have the theories of recovery advanced by the Court of Appeals submitted to the jury for the jury's determination of whether or not liability should attach under the theories advanced.

Turning now to Respondents' brief in opposition to petition for writ of certiorari in the instant case the gist of it can be fairly summarized as follows:

1. The matters raised by Petitioner in its petition for writ of certiorari have previously been decided by this Court contrary to Petitioner's position.
2. The facts judicially noticed by the Court of Appeals were not essential to its decision, but if they were essential to the decision, the facts were properly noticed since they were commonly accepted facts which could be noticed by the Court of Appeals.
3. The denial of a motion for new trial is discretionary with the Trial Court. Therefore, this Court cannot review the matters raised in the motion for new trial even if erroneously decided.
4. Petitioner had ample opportunity in the Trial Court to introduce proofs contesting the theories of recovery advanced by the Court of Appeals to sustain the jury verdicts even though those theories of recovery were not advanced by Respondents in the Trial Court and were not submitted to the jury for determination.
5. Counsel for Petitioner deliberately delayed the ultimate outcome of these cases; therefore this Court should not grant the Petition.

It is Petitioner's belief that the above described matters fairly represent the position taken Respondents in opposition to the petition and will answer them seriatim.

1. It is true, as Respondents assert, that following the decision of the Court of Appeals in setting aside judgments in favor of Petitioner and reinstating jury verdicts in favor of Respondents, Petitioner filed a petition for writ of certiorari in the October Term, 1964, under Docket No. 551. In that petition Petitioner pointed out at the outset that the final judgments had not been entered against Petitioner nor had Petitioner exercised its right to file a motion for new trial under the applicable Federal Rules of Civil Procedure. That petition was denied. Thereafter Petitioner filed its motion fer new trial in the District Court, which motion was denied and from final judgments entered, Petitioner, filed an appeal to the United States Court of Appeals for the Sixth Circuit, raising in its brief the constitutional issues which it presents in the instant petition. These same issues were raised in Petitioner's Petition for Rehearing *In Banc* filed with the Court of Appeals following receipt of the decision of the Court of Appeals on Respondents' appeal. As pointed out by Respondents in their brief in opposition the Court of Appeals directed Petitioner not to argue the the issues raised in the instant petition ostensibly on the grounds that this Court had denied Petitioner's first petition raising these points and therefore the matter was finally decided adversely to Petitioner. This is the same position taken by Respondents in the instant petition.

That a denial of petition for writ of of certiorari is not a determination on the merits of the matters raised in the Petition is clearly set forth by this Court in *Atlantic Coast*

Line R. Co. v. Powe, 283 U.S. 401, where the Court said, at page 403, 404:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

It is equally clear that the mere fact that this Court denied Petitioner's earlier petition does not foreclose this Court from entertaining this case on the merits at this time. In *Hamilton-Brown Shoe Co. v. Wolfe Brothers & Co.,* 240 U.S. 251, this Court said, at pages 257, 258:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the Circuit Court of Appeals on the first appeal and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the Court of Appeals upon the Second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari under §240, Jud. Code, derived from §6 of the Evarts Act of March 3, 1891, 26 stat. 826, 828, ch. 517. As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. * * * And, except in extraordinary cases, the writ is not issued until final decree. * * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of

public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

In the instant case, therefore, since final judgments have been rendered against Petitioner, this petition is properly before this Court and raises constitutional isseus of importance to the trial of all lawsuits, which issues were properly raised below even though Petitioner was foreclosed from arguing them.

2. Respondents desperately attempt to convince this Court that when the Court of Appeals judicially noticed "that a modern automobile can be started and moved its own length in a few seconds" and also "that any movement of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom," it meant nothing by these pronouncements even though in the very next paragraph of the decision it refers to the judicially noticed facts and rejects the District Court's Opinion, based upon the record pre-

sented in the District Court, that there was no negligence on the part of Petitioner. The facts which were judicially noticed were the *sine qua non* to support the theories of recovery advanced by the Court of Appeals in order to support the jury verdicts.

To be specific, the decision of the Court of Appeals would permit the jury to find Petitioner negligent for failing to make an earlier application of the brakes on its train on the theory that an earlier application of the brakes would have afforded a few seconds more time before the moment of impact and in this period of time Respondents' driver could have started and moved the automobile and, if so, the accident or results thereof may have been different. Under this theory it is essential to show that the automobile could have started and moved in the undisclosed additional time which might have been afforded if there had been an earlier application of the brakes. As pointed out in the petition, there was absolutely no proof that Respondent's automobile could have been started and moved regardless of any additional time which may have been afforded. On the contrary, Respondents had pleaded that the auto was stalled, helplessly disabled, and in a position of inextricable peril and introduced proof to support these allegations. In addition, Respondents introduced proof that the driver of the car had ceased her efforts to move the car some seconds before the impact. Therefore, contrary to the pleadings and proof, and in order to supply this lack of proof the Court of Appeals took judicial notice that a modern automobile can be started and moved in a very few seconds and thereafter inferred that Respondent's automobile could have been started and moved in a very few seconds. This inference was drawn by the Court of Appeals and not by the jury since the jury

was not instructed by the District Court nor did Respondents request the jury to be instructed to permit a recovery on this theory.

Secondly, and in the alternative, in the event the automobile could not have been started and moved the Court of Appeals would permit the jury to find Petitioner negligent on the grounds that an earlier application of the brakes would have slowed the train somewhat and that a slower impact force (which on the record would be 40 miles per hour rather than 55 miles per hour) would have resulted in less fatal and severe injuries. There was absolutely no proof that a lessened impact force would have resulted in less fatal or less severe results. In order to supply proof to support this latter conclusion the Court of Appeals took judicial notice that "lessened force" could have prevented the deaths or injuries complained of. This conclusion was reached solely by the Court of Appeals since the District Court did not instruct the jury that it could find Petitioner negligent for failinng to slow its train on the grounds that the deaths and injuries could have been lessened or avoided; nor did Respondents request that the jury be so instructed. Neither the judicially noticed facts nor the theories herein referred to were submitted to the jury for the jury's determination of whether or not liability should attach under the facts and theories advanced by the Court of Appeals. Since neither the facts nor the theories were presented in the District Court, Petitioner did not offer proof nor was it required to offer proof in opposition.

Also contrary to Respondent's position, that is, that the facts judicially noticed by the Court of Appeals were immaterial, is the District Court's decision on Petitioner's Motion for a New Trial. The District Court clearly recog-

nized that the facts judicially noticed supported the theory of recovery advanced by the Court of Appeals for in commenting on the reasoning of the Court of Appeals the Court stated (App. 42):

> "If the car could get off the tracks, the defendant might well be found negligent for failure to slow up in order to give the car more time to get off the track. And if the car could not get off the track the defendant might well be found negligent for failure to slow up in order to lessen the impact, and therefore to reduce the seriousness of the accident."

The Court of Appeals adopted the District Court's opinion in affirming the judgments (Appendix "F," App. 55).

Respondents next argue that the facts judicially noticed were commonly accepted facts. While Petitioner does not dispute the fact that a modern automobile in proper mechanical condition being operated by a competent driver can be started and moved its own length in a very few seconds, it does dispute, however, the judicially noticed fact, that a second-hand three-year old automobile which had somehow stalled on Petitioner's track and was in a helpless, disabled condition and being operated by a novice driver unfamiliar with the mechanical aspects of automobiles could be started and moved in a very few seconds. This is especially true when it is undisputed that the driver had ceased trying to start the car in the last few seconds before the collision.

Petitioner also disputes the judicially noticed fact that a lesser impact speed would have substantially changed the nature of the injuries, for it does not agree that it is a commonly accepted fact that occupants of an automobile struck by a 4,136-ton train traveling 40 miles per hour are

apt to fare better than those struck by the same train at a speed of 55 miles per hour. In any event, however, if Petitioner is to be saddled with liability on a theory that a lower impact speed may have resulted in lesser injuries, it should have at least been apprised of this theory of recovery dur ing the trial of the case in order to permit Petitioner to introduce rebutting proofs and this theory of recovery should have been submitted to the jury for the jury's ultimate determination of whether or not Petitioner should respond in damages on this theory.

3. There is no question but what the District Court has a large measure of discretion in the granting or denying of motions for new trials. However, the discretion is limited to deciding where the weight of the evidence lies. The District Court does not have d scretion to decide matters of law improperly and it is the improper decision on matters of law to which this petition is directed.

4. Respondents take the position that Petitioner was not foreclosed during the trial of the cases from introducing proofs to contest the facts which were judicially noticed by the Court of Appeals even though the facts judicially noticed were not pertinent to any of the theories of recovery advanced in the District Court or submitted to the jury. If opposing counsel did not object, and if the District Court did not object, it is obvious that Petitioner could have introduced any proofs it desired on any point, whether pertinent or not to the issues raised in the District Court, but it would have been just as ridiculous for Petitioner to introduce proofs on issues not raised in the District Court in the instant case as it would have been for Petitioner to introduce proofs contesting the applicability of the statute involved in the *Heider* case, *supra*, when the statute had not been pleaded, introduced or relied upon as a defense during the trial of that case.

Specifically, where Respondents pleaded and proved that the automobile was stalled, helplessly disabled and in a position of inextricable peril on Petitioner's tracks, and Petitioner agreed with those facts during the trial, there seem to be little reason for Petitioner to introduce proof on this point, for Petitioner could hardly anticipate that under these circumstances the Court of Appeals would judicially notice that the automobile could have been started and moved if given some undisclosed additional time. It is also inconceivable that Petitioner would be required to introduce proofs that the speed of impact would not have changed the nature of the injuries when Respondents offered no proof on this point and the jury was not permitted to find that a lesser impact speed may have changed the nature of the injuries.

5. The trial of opposing counsel may be "fair game" by members of plaintiff's bar, but it hardly is a matter to be raised in the United States Supreme Court. Counsel for Respondents conveniently fail, in their brief in opposition, to apprise the Court that the matter of alleged dilatory tactics was urged upon the Court of Appeals and that Court summarily dismissed the matter and suggested, from the record of the proceedings, that Respondents had had an expeditious handling of their claims and that the time consumed in reaching that stage of litigation was no more than one would normally expect in any adversary proceeding.

CONCLUSION

For the reasons set forth herein and in its petition, and also in the interests of law and substantial justice, the Petition for Writ of Certiorari should be granted and the case remanded for a new trial.

Respectfully submitted,

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